TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 648

THE UNITED STATES OF AMERICA, CINCINNATI AND COLUMBUS TRACTION COMPANY, AND INTERSTATE COMMERCE COMMISSION, APPELLANTS,

vs.

BALTIMORE AND OHIO SOUTHWESTERN RAILROAD COMPANY AND THE NORFOLK AND WESTERN RAILWAY COMPANY.

APPEAL FROM THE UNITED STATES COMMERCE COURT.

FILED MAY 11, 1912.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 1133.

THE UNITED STATES OF AMERICA, CINCINNATI AND COLUMBUS TRACTION COMPANY, AND INTERSTATE COMMERCE COMMISSION, APPELLANTS,

vs.

BALTIMORE AND OHIO SOUTHWESTERN RAILROAD COMPANY AND THE NORFOLK AND WESTERN RAILWAY COMPANY.

APPEAL FROM THE UNITED STATES COMMERCE COURT.

INDEX.

a United States Commerce Court.

No. 60.

The Baltimore & Ohio Southwestern Railroad Company and The Norfolk & Western Railway Company, *Petitioners*,
vs.
The United States of America and The Cincinnati & Columbus Traction Company, *Respondents*,
Interstate Commerce Commission, *Intervener*.

UNITED STATES OF AMERICA, *ss:*

Be it remembered that in the United States Commerce Court, in the City of Washington, District of Columbia, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

Petition.
Filed January 22, 1912.

1 In the United States Commerce Court.

In equity.

The Baltimore & Ohio Southwestern Railroad Company and The Norfolk & Western Railway Company, *Petitioners*,
vs.
The United States of America and The Cincinnati & Columbus Traction Company, *Respondents*.

To the Honorable Judges of the United States Commerce Court:

The petitioner, The Baltimore & Ohio Southwestern Railroad Company, is, and at all the times hereinafter stated was, a consolidated corporation organized under the laws of Ohio and Indiana, and operating a line of railway extending through and across said States, and into and through the State of Illinois, and into the State of Kentucky. The line of said petitioner extends to Hillsboro,
2 in Highland county, Ohio, and into and through the counties of Highland, Brown, Clermont, and Hamilton in said State, and the municipalities of Hillsboro, Blanchester, Loveland, Madeira, Madisonville, Norwood, Cincinnati, and other municipalities in said counties, and has been maintained and operated by said petitioner and its predecessors in title into and through said places continuously at all times for sixty years.

The petitioner, The Norfolk & Western Railway Company, is a corporation organized under the laws of Virginia, operating a line of railway extending through parts of the States of Ohio, West Virginia, Kentucky, Virginia, Maryland, North Carolina, and Tennessee, and to and into and across, among others, the counties of Highland, Brown, Clermont, and Hamilton, in Ohio, and into and through the municipal corporations of Hillsboro, Sardinia, Mt. Orab, Williamsburg, Batavia, Cincinnati, and other municipalities in said counties,

said line of railway having been maintained and operated by petitioner and its predecessors in title into and through said places continuously at all times for about thirty years.

Both of said petitioners were and are incorporated and operated as steam railroad companies, engaged in the business of interstate commerce in the carriage of passengers and property between points on their own lines and points on the lines of other steam railroad companies with which they connect in the above named States,
3 said commerce extending throughout the United States and elsewhere.

Said petitioners now have, and at all the times hereinafter stated have had, tariffs filed as provided by law with the Interstate Commerce Commission, and posted and published as the law requires, prescribing rates for the transaction of their business of interstate commerce, and have been and are subject to all the laws and to all the rules and regulations prescribed by Congress or the Interstate Commerce Commission with respect to the operation and maintenance of their roads.

The Cincinnati & Columbus Traction Company is a corporation, organized under the laws of Ohio in the year 1901 as an electric railway, for the transaction of business between points in said State, and does not now do, and never has done, business in the nature of interstate commerce, and is not and never was a carrier of such commerce. Not until subsequent to the report of the Interstate Commerce Commission hereinafter referred to did the said Traction Company file with said Commission any schedule of rates, or otherwise attempt to qualify to conduct interstate business.

The line of railway of the Traction Company extends from Norwood, in Hamilton county, through and across the counties of Hamilton, Clermont, and Brown to and into the city of Hillsboro, in Highland county, Ohio. Its line of railway did not at the time of the filing of its complaint with the Interstate Commerce Com-
4 mission, as hereinafter recited, or at the time of the notice given on November 12, 1908, to which reference is hereinafter made, cross or intersect or connect with the line of road of either petitioner, nor has the same at any time since said date crossed, intersected or connected with the line of railway of either of the petitioners; but the same from Norwood to Hillsboro lies and extends between the lines of these petitioners, and serves the same persons, municipalities, and communities that are served by these petitioners.

The lines of the petitioners and of the said Traction Company and many of the features of the territory which they traverse are correctly shown on the blueprint diagram herewith filed as Exhibit No. 1 and prayed to be read as a part hereof.

On November 12, 1908, said Traction Company served written notice on each of the petitioners, demanding that they establish or permit to be established track connections and joint rates for the interchange of interstate traffic.

Said Traction Company did not at any time prior to the announcement by the Commission of its report hereinafter noted make any other or further demand for such track connections, save by instituting and carrying on its proceeding before the Commission.

Afterwards, on the 21st day of January, 1909, said Traction Company filed its petition with the Interstate Commerce Commission against petitioners and The Cincinnati, Lebanon and Northern Railway Company, which was docketed by the Commission as case No. 2062, praying that petitioners be required to establish with it track connections and through routes and joint rates for the transportation of interstate commerce, and be required to exchange with it cars and other equipment.

Petitioners filed their answers to said complaint and evidence was taken and the hearing concluded on October 30, 1909. Afterwards said Traction Company asked said Commission to allow the case to be reopened, which was done, and, March 21, 1910, on further hearing, it filed in said proceeding the written consent of one Harvey Anderson, a merchant of Marathon, located at a station on the line of said Traction Company, that his name might be used as an additional complainant in the said proceeding, and also then filed the written consent of the Central Lumber Company, per George Cooper, lumber merchant of Hillsboro, for the use of its name in the same manner; but neither said Harvey Anderson nor said Central Lumber Company nor said George Cooper at any time made application to petitioners, or either of them, to construct, maintain or operate a switch connection with the line of said Traction Company, or that they exchange business or equipment with said company; nor have the said parties, or any of them, ever done anything, except as hereinbefore recited, in the way of requesting anything of petitioners with respect to the transaction of interstate business. There was no evidence offered in the proceeding before the Commission as to the extent of the interstate business of said Harvey Anderson or said Central Lumber Company or said George Cooper, and nothing whatever was offered to show whether the income therefrom, assuming its existence to any extent, would be sufficient to bring any net revenue whatever to petitioners or either of them for the services expected to be rendered by them, or to show that the revenue would be sufficient to reimburse petitioners the expense to which they would be put on account of a track connection or the maintenance thereof or the filing of tariffs with respect to the interstate business of said parties.

Afterwards, on March 14, 1911, the Interstate Commerce Commission made a report in said proceeding, a copy of which is herewith filed, marked Exhibit No. 2, and prayed to be read as a part hereof, in which the Commission expressed the opinion that the said Traction Company is entitled to a switch connection with the line of the petitioner, the Baltimore & Ohio Southwestern Railroad Company, at Madeira, a point shown on the diagram aforesaid, and to a switch connection at or near Hillsboro, another point shown on said dia-

gram, with the lines of both petitioners, and that the petitioners should unite with the said Traction Company in establishing through routes for the movement of interstate traffic. Thereafter, on
7 the 13th day of December, 1911, the Commission made an order in the said proceeding, as follows:

"This case coming on to be further considered, and it appearing that the parties in interest have failed to put in effect the findings made by this Commission in its report herein, dated March 14, 1911, and that the above-named complainant petitions by counsel for an order of relief in the premises:

"It is ordered that defendant The Baltimore & Ohio Southwestern Railroad Company be, and it is hereby notified and required to construct, on or before the 15th day of February, 1912, and thereafter to maintain and operate during a period of not less than two years, a switch connection for the transfer of interstate traffic to and from the line of the above-named complainant company at Madeira, Ohio, the expense of installing such connection to be borne by said complainant.

"It is further ordered that said defendant The Baltimore & Ohio Southwestern Railroad Company be, and it is hereby, notified and required to construct, on or before the 15th day of February, 1912, and thereafter to maintain and operate during a period of not less than two years, a switch connection for the transfer of interstate traffic to and from the line of the above-named complainant company at, or near, Hillsboro, Ohio, the expense of installing such connection to be borne by said complainant.

"It is further ordered that defendant Norfolk & Western
8 Railway Company be, and it is hereby notified and required to construct, on or before the 15th day of February, 1912, and thereafter to maintain and operate during a period of not less than two years, a switch connection for the transfer of interstate traffic to and from the lines of the above-named complainant company at, or near, Hillsboro, Ohio, the expense of installing such connection to be borne by said complainant.

"And it is further ordered that defendants The Baltimore & Ohio Southwestern Railroad Company and Norfolk & Western Railway Company, according as their various lines may run, be, and they are hereby, notified and required to establish and put in force, on or before the 15th day of February, 1912, and for a period of at least two years thereafter to maintain, through routes to and from interstate points to and from all points on the complainant's line between and including Boston and Dodsonville, in the State of Ohio, in order that shippers at and between those points may have access to and from interstate points by interchange of cars under through billing and through charges based upon the rates of the respective carriers herein to and from the junction points established by this order, the complainant carrier having filed its local rates with this Commission as applicable to interstate movements over such through routes."

Petitioner, the Baltimore & Ohio Southwestern Railroad Company, avers it to be a fact, which was not controverted in the
9 said proceeding, that the contour of the country at Madeira is such that in order to make a track connection between its lines and the line of the Cincinnati and Columbus Traction Company on which cars could be interchanged, it would be necessary that the same be laid to a large extent upon property between the right of way occupied by the line of the Traction Company and that occupied by the line of the said petitioner, there being no other reasonably practicable method of making such connection, and said petitioner does not own at said place any right of way or property beyond the line of that used for its own tracks which could be availed of for such connection across the intermediate territory.

Petitioners aver that because of the facts hereinbefore and hereinafter alleged, all of which were brought to the attention of the Commission in said proceeding, and which facts, all and singular, are now relied on as the basis for the relief herein sought, said order is invalid and should be enjoined and wholly set aside and annulled, for the reasons now to be stated:

1. Said Traction Company has no right or authority under the law of the State of Ohio, pursuant to which it was incorporated and is operating, to have its tracks connected with those of the petitioners, or either of them. It is controlled by the law of that State applicable to electric railways, and not by the law applicable to steam
10 railways such as those owned by these petitioners. It is an interurban enterprise, designated as a street railroad as distinguished from a steam railroad, and admittedly restricted and confined to the use of electric power, both by law and by prohibitions in the deeds and licenses pertaining to its roadbed and operation, and is therefore in an entirely different class from that to which petitioners belong. The said Traction Company is regulated in a different manner from petitioners in respect to fencing, gates, clearances, highway crossings, occupation of streets, liability for injury to employees, track elevation, track connection, and interchange of business and equipment, and in respect to other material matters. The absence of any relation of the said Traction Company to interstate commerce or business was and is as hereinbefore stated.

2. The said Traction Company is not and never has been such a lateral branch line of railroad as is contemplated by and described in the provision of the Act to Regulate Commerce relative to such track connections as were prayed for in the said proceeding and are prescribed by said order, and the said order is an attempted exercise by the Commission of powers which it does not possess.

3. At the time the said proceeding was filed by the said Traction Company there was no statutory provision authorizing the Commission to entertain it, and at no time thereafter was an appli-
11 cation in writing made to petitioners, or either of them, by said Traction Company or by any other person, to install and operate a track connection with the line of the said Traction Com-

pany, and thus the Commission's jurisdiction to make the said order, if it otherwise existed, was not invoked in the manner provided by the statute.

4. Said order is dictated by a purpose to require, and does require, petitioners, and each of them, to interchange equipment with the said Traction Company, when the track connections thereby prescribed have been made. The Commission is without constitutional power to make or impose or take any step towards imposing such requirement on petitioners, since the fifth amendment to the Constitution guarantees them, and each of them, such ownership and use of their property as would be invaded and taken away by a compulsory interchange of equipment, and further, since there is no statutory provision under which they are or can be compensated for the loss of such ownership and use as is incident to the interchange of equipment between carriers, and particularly in cases where one of the carriers is not in a position to engage in the proposed interchange, which is true of the said Traction Company, for the uncontradicted evidence before the Commission in the said proceeding was to the
12 effect that the said Company does not own or possess locomotive engines and cars of sufficient size, strength, and fitness to be operated on and over the lines of petitioners, or either of them, and it is a fact that it has never at any time since November 12, 1908, owned or possessed any such engines or cars. Further, petitioners aver that said Traction Company has supplied itself with no more equipment of any kind than necessary for conducting the business on its own line, and with any other line with which it may now connect; and should petitioners, or either of them, be required to place their equipment on the line of the Traction Company and the lines of other carriers similarly situated, petitioners would not, nor would either of them, be able to retain upon their own lines sufficient equipment to supply the demands of their own business.

5. The uncontradicted evidence before the Commission was to the effect, and it is the fact, that the curves on the line of the Traction Company in the town of Madisonville, which is shown on the aforesaid diagram, are such as to prohibit the operation of a freight car or cars herein without disregard of the safety-appliance law, and that at Milford, another place shown on the said diagram, the clearance between the said company's roadbed and the bridge of the Pennsylvania road, which crosses the company's line at that point, is so limited as to render dangerous the operation of ordinary freight cars such as are used by petitioners. The said order could not have been
13 made and cannot be enforced without a disregard of these practical difficulties which involve, to say the least, the safety of those who may be engaged in the operation of ordinary freight cars over the said company's line in the event of the enforcement of the order.

6. There was strong and impressive evidence introduced in the said proceeding showing that, on account of the physical condition of the said Traction Company's roadbed, the operation of loaded

freight cars, such as those used by petitioners, over that company's lines, would be highly unsafe both to persons and to property, and petitioners believe and aver that the conditions in that respect have not changed for the better since the introduction of such evidence. The Commission, in its report, said:

"But whatever may be the facts with respect to all the details of that nature referred to in the record, we assume that the self-interest of the complainant will be sufficient to lead it to make the necessary arrangements so to conduct its operations as to be able to move traffic over its line with safety. This we think it can do, and this we doubt not it will do. We attach no importance therefore to the suggestion that the cars of the defendants will not be safe on the line of the complainant or to the suggestion that if an order is entered requiring the defendants to join in through routes and through rates with the complainant an undue burden will be
14 placed upon them under the so-called Carmack amendment to the act, because of the condition of the complainant's roadbed and bridges."

Petitioners aver that they cannot be compelled, for the protection of their equipment and the traffic which may be loaded in their cars, to depend, nor can the employees of either of the petitioners or the Traction Company be compelled to depend for their protection, upon the uncertain action of the Traction Company as it may or may not be influenced by the promptings of self-interest. Petitioners aver that, if forced to execute the said order, and allow their equipment to be operated over the line of the Traction Company, they will thereby and otherwise be in danger of sustaining frequent and serious losses for which there is no assurance whatever that they will receive compensation, and thus will stand in peril of being subjected to irreparable injury. Petitioners aver that they, as initial carriers issuing bills of lading over through routes, will be liable, under the provisions of section 20 of the Act to Regulate Commerce as amended June 29, 1906, known as the Carmack amendment, for any loss, damage or injury to freight caused by the Traction Company; and petitioners will be relegated for protection to an action over against the Traction Company, and in this, as in the other ways herein set forth, petitioners will be subjected to irreparable injury. As hereinafter stated, the financial condition of the Traction Company does not inspire confidence in its ability to
15 respond to even moderate demands for which it might become liable should its self-interest not induce it to make its roadbed entirely secure for the transportation of property and persons.

7. The earnings of the said Traction Company at the time the evidence was introduced in the said proceedings before the Commision were insufficient to pay its operating expenses, and it was then not only heavily mortgaged but involved in, or threatened with, litigation in respect to certain liabilities asserted against it. Its accounts showed a deficit, and there was a possibility of claims against it for a considerable amount being reduced to judgment.

Petitioners aver and believe that there has since been no material improvement in the financial condition of said company, and they should not be made to enter into traffic arrangements, in the manner proposed by the said order, with a railway corporation which is not in a position to save harmless petitioners from the consequences of the grave responsibilities which the petitioners will inevitably be called on to assume by complying with said order.

8. In its report the Commission frankly states that its conclusions are based more largely upon its own investigations than upon the testimony of witnesses who testified in the said proceeding. The petitioners were not advised of and do not know what investigations are referred to, or when or by whom they were made, but they aver that, in basing conclusions upon such investigations, instead of upon the evidence introduced in the said proceeding, the Commission exceeded its authority.

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In view of the premises petitioners pray that the aforesaid order of the Interstate Commerce Commission may be finally enjoined and wholly set aside and annulled; that preliminary or interlocutory injunctions may be awarded suspending the operation of the said order for such period or periods as may be deemed requisite, and that they may have such other, further, and full relief as the case requires.

An to this end petitioners pray that the United States of America and The Cincinnati & Columbus Traction Company may be made parties respondent hereto and required to answer the allegations of this petition, an answer by them, or either of them, under oath, being waived.

And, as in duty bound, petitioners will ever pray, etc.

THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY,
By EDWARD BARTON, *Counsel.*
THE NORFOLK & WESTERN RAILWAY COMPANY,
By JOSEPH I. DORAN,
THEODORE W. REATH,
R. WALTON MOORE, *Counsel.*

17

EXHIBIT NO. 2.

Report of the Commission.

HARLAN, *Commissioner:*

The complainant company was organized in 1901 under the laws of the State of Ohio, with charter power to build and operate an electric railroad from Columbus to Cincinnati. The line as actually constructed in 1905 reaches neither of these points, but extends from Norwood, a suburb of Cincinnati, to Hillsboro, a distance of some 53 miles; it lies wholly within the State of Ohio and belongs to the class of roads commonly referred to as interurban roads. It is before us praying for an order requiring the defendants "to establish connections and joint rates for the interchange of interstate traffic."

MAPS

TOO

LARGE

FOR

FILMING

Besides contesting the issue on the general merits the defendants have interposed one or two objections of a technical nature that must first have consideration:

1. The legal right of the complainant to demand a physical connection with the defendants is questioned. Decisions of the Supreme Court of Ohio are cited to show that interurban electric railways are classified in that State as street railways, and are controlled by other statutes than those relating to steam railways. With respect to the matter of fences, gates, crossings, clearances, liability to employees, and track elevation, the requirements imposed on electric lines under the local laws are said to differ materially from those imposed on steam roads. The State courts, as we are advised, have definitely held that the laws relating to steam railroads are not to be understood as being applicable to electrically operated road unless that intention expressly appears. One statute to which special reference is made contains a provision as follows:

"Steam railroad companies as between themselves, and in-
18 terurban and electric railroads as between themselves, shall afford reasonable and proper facilities for interchange of traffic between their respective lines, for forwarding and delivering passengers and property, and shall transfer and deliver without unreasonable delay or discrimination car, loaded or empty, freight or passenger, destined to a point on its own or connecting lines."

The defendants contend that under this provision the complainant, being an interurban and an electrically operated line, is expressly precluded from demanding a track connection with either of the defendant steam lines and is also precluded from demanding an interchange with them of equipment and traffic. But under the laws of Ohio the complainant seems to be a common carrier of persons and property and is actually engaged in the transportation of both classes of traffic. It also carries express matter. On its line are shippers and towns that desire, in addition to its local service, access to and from interstate points on the public highways operated by the defendants; and in this proceeding we are asked to open these highways to their interstate traffic by requiring the defendants to connect their lines with the line of the complainant and to establish with it through routes and point rates. Under the act to regulate commerce as amended express power is given us to grant such relief. If therefore the facts and conditions are such as to warrant an order to that effect, we think we need not look beyond that act for any limitation upon our authority to enter it. A local law under which an electrically operated railway may have no right to demand a switch-track connection and interchange of traffic with a steam railway may be controlling in so far as it relates to traffic moving wholly within the State; but it cannot be permitted to operate as an impediment to the movement of interstate traffic after the Congress has legislated upon the subject by specifying the grounds upon which interstate shippers may demand such connections and interchange of

traffic. The general principles underlying this conclusion are well understood and have so often been enforced by the courts that the citation of authorities seems not to be required.

19 2. It is also contended that the proper parties complainant are not before us, and that we are therefore without jurisdiction to order the relief asked. The petitioner made application to the defendants for a switch-track connection and, being refused, instituted this proceeding upon its own complaint. During the pendency of the proceeding the Supreme Court of the United States in *Interstate Commerce Commission vs. D., L. & W. R. R. Co.*, 216 U. S., 531, held that section 1 of the act as it then appeared on the statute books not only required the application for a switch-track connection to be made by a shipper, but gave us authority to act only upon complaint by a shipper. To avoid the possibility of having its complaint dismissed on this ground, the petitioner, at a subsequent hearing, filed with the Commission two letters addressed to the complainant, one by a genral merchant at Marathon, and the other on behalf of a lumber company at Hillsboro, both being points on the line of the complainant. As they are of similar import, it will suffice to reproduce but one of them here:

"MARATHON, OHIO, *March 21, 1910.*

"*The Cincinnati & Columbus Traction Co., Norwood, Ohio:*

"GENTLEMEN: I beg to advise that your attorney, C. B. Matthews, may use my name as the coplaintiff in your suit before the Interstate Commerce Commission in reference to interchange of freight and cars. In fact, I will do almost anything to help your company in its proceedings in this suit, as it will greatly benefit me and the community at large.

"Wishing you success and trusting this will be satisfactory, I remain,

"Respectfully yours,

"H. ANDERSON,

"*General Merchandise Merchant, Marathon, Ohio.*"

The writers of these letters had given testimony tending to support the general allegations of the complaint. An application that they be made cocomplainants, prepared by the attorney of the com-

20 plainant on the authority of these letters, is also of record. To this application the defendants objected, insisting, one of them perhaps more strongly than the other, that the letters and application can not be regarded as having the force and effect of making the two shippers co-complainants in the proceeding. They also contend that no application in writing for a switch-track connection has been made by these shippers to either of the defendants; and that the petition must therefore be dismissed on the authority of the case above cited.

In the general public interest the Commission has endeavored to simplify its practice and procedure and to perform its functions in a practical way, without permitting merely technical matters to inter-

fere unduly with substantial results. In *Missouri & Kansas Shippers Asso. vs. M., K. & T. Ry. Co.*, 12 I. C. C. Rep., 483, 484, we said:

"While its procedure is to some extent judicial in nature, the Commission is essentially an administrative body; and in the adjustment of contentious proceedings of this kind it ought to examine into the real substance of the matter unembarrassed by considerations that are purely technical."

The letters of these two shippers, in connection with their testimony and their petition to be made cocomplainants, seem to us not only sufficient for all practical purposes to bring them before us as cocomplainants and to serve as their application in writing for a switch-track connection, but sufficient to give the defendants full notice and to advise the Commission of their interest in the questions at issue. On the other hand, the testimony offered by the defendants seems to cover the entire ground, and in making these objections it is not suggested that any additional testimony is required by the presence on the record of these two shippers as cocomplainants or that further testimony is in fact available. There was also abundant opportunity during the months that intervened between the closing of the record and the oral argument to have offered additional testimony. Under such circumstances, to take a technical view of the state of the
21 record would be inconsistent with our general practice of getting at the substance of things when possible; and, inasmuch as the whole situation is fully disclosed and we are in a position to protect the legal and substantial rights of all the parties in interest, we think we may fairly find, as we do, that the necessary parties complainant are before us and that all the requirements of the act, in order to give us jurisdiction of the subject-matter, have been observed. Moreover, if the record when closed was defective on these grounds the defect may be held to have been cured by the recent amendment to the act, that became effective before the case was argued and submitted, and which specifically permits complaints of this character to be entertained when filed by the "owner of such lateral branch line of railroad."

Coming now to the merits, the first inquiry is whether a switch connection, using the language of the act, "is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same." On this point we think the record leaves no room for doubt. A physical connection with the defendant, the Baltimore & Ohio Southwestern, at one time existed at Madeira and also at a point spoken of in the record as Hillsboro Junction. At the same time there was also a connection with the line of the Norfolk & Western at the latter point. They were put in when the line of the complainant was under construction, and were removed after its completion, apparently in accordance with a previous understanding to that effect. It is not to be doubted that it is reasonably practicable to restore these connections at those points or to put connections in elsewhere, or that when restored or put in elsewhere they can be operated with safety. Nor

can it be doubted that there will be sufficient traffic to and from points on the line of the complainant reasonably to compensate the defendants for constructing, maintaining, and operating such switch connections with the complainant.

The complainant also demands, as we understand the petition, through routes and joint rates to and from all interstate points reached by the defendant lines and their connections. When
22 the complaint was filed the Commission, under section 15, had authority, after hearing on a complaint, to establish through routes and maximum joint rates and to prescribe the divisions thereof, "provided no reasonable or satisfactory through route" existed. In the amendment of June 18, 1910, this limitation was omitted. As the section now reads, the only limitations on our authority to establish through routes and joint rates that need be mentioned here are: (*a*) We may not require any railroad involuntarily to embrace in a through route substantially less than the entire length of its road between the *termini* of the proposed through route. (*b*) We may not establish through routes and joint rates between a steam railroad and a street electric passenger railway that does not transport freight in addition to its passenger and express business. The first of these limitations must, of course, be observed in all cases; the second has no application in connection with this complaint.

This is the first occasion upon formal complaint that we have had to examine the amended provision. But one point that seems to be entirely clear is that, although the complaint was filed before the amendment became effective, we can act only under the authority that we now have. We gather also from a careful reading of the amended clause that it was the purpose of the Congress to widen the scope of our powers to establish through routes and joint rates rather than to narrow them, and to leave in the Commission full discretion to act in such cases in the light of all the facts and circumstances and according to what may seem wise, fair, reasonable and equitable in each case. We shall dispose of this complaint with that understanding of the extent of our authority.

For a distance of about six miles eastwardly from Norwood the line of the complainant not only parallels the line of the Baltimore & Ohio Southwestern but practically adjoins the right of way of that defendant. A few miles farther to the east it approaches and at Perintown practically adjoins the right of way of the Norfolk & Western and parallels that road for a few miles to Stonelick, at which point it is only about a mile distant from the Norfolk
23 & Western. Its station at Norwood also immediately adjoins the stations of the defendants, the Baltimore & Ohio Southwestern and the Cincinnati, Lebanon & Northern Railway Company. For a distance of some four or five miles out of Hillsboro, its eastern terminus, the complainant's line again parallels the tracks of the Baltimore & Ohio Southwestern, the rights of way of the two lines being immediately adjoining. It was at a point about a mile and a

quarter west of Hillsboro that the line of the complainant was formerly connected by a switch track with the line of the Baltimore & Ohio Southwestern and also with the line of the Norfolk & Western. On that end of the line are the villages of Hoagland, Fairview, and Allensburgh, which are, respectively, a mile and a half, one mile, and three miles distant from a station on the line of the Baltimore & Ohio Southwestern, but much more distant from any station on the Norfolk & Western. They are small communities with no commercial enterprises of such character that they may be said not to be reasonably well served at this time, so far as interstate shipments are concerned, by the Baltimore & Ohio Southwestern. Among all the witnesses that testified none resided at any of these places, and therefore the record discloses no complaint of inadequate transportation facilities at these points or the need of additional facilities. At the western end of the line are Madisonville, Madeira, Milford, Perintown, Stonelick, and Boston, some of which are practically within a stone throw either of the Baltimore & Ohio Southwestern or the Norfolk & Western. Boston, the most distant of the points last mentioned, is about five miles by the country roads from Batavia and something less from Baldwin, stations on the Norfolk & Western; it is not less than eight miles from the nearest station on the tracks of the Baltimore & Ohio Southwestern. Dodsonville, toward the eastern end of the complainant's line, is also four or five miles distant by wagon road from any station on the Baltimore & Ohio Southwestern and as much as eight miles from the nearest station on the Norfolk & Western. Between that point on the east
24 and Boston on the west are a number of towns and villages that are located from about five miles to as much as ten or twelve miles by wagon road from the nearest stations on the lines of one or the other of the defendants.

Under the principles announced in *Chicago & Milwaukee Electric R. R. Co. vs. I. C. C. R. R. Co.*, 13 I. C. C. Rep., 20, we would not open through routes and establish joint rates for Norwood or Hillsboro because both places now reach all interstate points over each of the defendant lines. Moreover, through routes and joint rates between interstate points and Norwood and Hillsboro, in connection with the complainant's line, could not lawfully be required under the terms of section 15 of the act as lately amended. Nor should we open through routes and establish joint rates between interstate points and Madisonville, Madeira, or Hoagland over the complainant's line in connection with the Baltimore & Ohio Southwestern, because those points are already served by the latter line. Nor should we under the views announced in that case open through routes and joint rates to and from Fairview, Allensburgh, Milford, Perintown, and Stonelick, all those points being within a short and reasonably convenient distance of stations on one or the other of the defendant lines. On the other hand, under the disposition made of a similar complaint in *Cedar Rapids & Iowa City Ry. & Light Co. v. C. & N. W. Ry. Co.*, 13 I. C. C. Rep., 250, we are of the opinion that the defendants may

properly be required to join with the complainant in opening through routes and establishing joint rates between interstate points and Boston, Monterey, Hartman, Marathon, Quinns Crossing, Vera Cruz, Fayetteville, St. Martins, Stringtown, and Dodsonville. None of these towns is within less than approximately five miles, and two or three are ten miles or more by the country roads from any station on the defendant lines. To say that such places are already reasonably well served by either of the defendants is to announce the definite proposition that a wagon haul of from five to ten miles is not an improper burden to put upon an interstate shipper. But in such a view we are not ready to concur as a fixed rule, even
25 when the country roads are so good as the roads in this territory are said to be. While we have little sympathy with, and will not ordinarily lend our aid to, an effort by one road to secure traffic that is reasonably tributary to another road by compelling the latter to join with it in through routes and rates, we shall not permit the theory as to what traffic is tributary to a road to be pushed to such an extreme as to impose an undue burden upon shippers. Confining our ruling to the special facts of the case and to the points last mentioned, we think the prayer for through routes should be granted.

But besides contending that the country traversed by the line of the complainant has been adequately served by one defendant for not less than 50 years and by the other for not less than 25 years, the defendants also assert that the combined traffic to and from this territory is very light, and that the little revenue received from it ought not to be taken from them by a line that should never have been built; that, considering the transportation requirements of this district and the facilities offered by the defendants, the complainant's line is one that would not have been allowed to be constructed under a system of laws, prevailing in some of the States, that requires previous official sanction when a railroad enterprise is proposed and a line laid out; and that "one of the questions involved is whether the owners of a line of railway thus unwisely projected and built can demand a division with the older lines at their expense and without any compensating advantage to the community in general traversed by the several lines." In this connection the defendants state that no dividends have ever been paid on the outstanding stock of the complainant company; that its line is operated at a heavy annual deficit, and that it is not earning even operating expenses, but is approaching bankruptcy. Figures are also given purporting to show that the freight rates on the lines of the defendant railroads to the territory in this vicinity produce "not more than 1.3 per cent profit on the investment." Excluding Hillsboro and Greenfield, the general district has lost both in wealth and population since 1860. It is said, gen-
26 erally speaking, to be an infertile and very poor farming country, not producing enough grain and feed to supply the local demand. And most of the lumber, it seems, has been cleared off.

The defendants object to through routes and joint rates with the complainant on still other grounds. It is insisted that its right of

way is unfit for the operation of such trains as are used on the regular lines. Referring to the matter of ballast, the line of the complainant is said to be a "one coat" road and without any ballast in some places, while in others the fills have been much washed. We are also told that the bridges in some cases have no sufficient margin of safety and are largely made from material discarded by the regular lines as second-hand stuff, to be sold and not used; that the trestles are subject to the same general criticism; that the grades are steep and the curves sharp; that while operation is possible it is thought to be dangerous; that such freight cars as the complainant has were purchased of the Cincinnati, Hamilton & Dayton from among those condemned as no longer fit for use on that line, and that if put upon either of the defendant lines would be "crushed like eggshells." Finally, it is said that the clearances on the complainant line are not such as are required by the local law of steam roads, although regular line equipment can get through; that for five miles the line runs on public streets, and that at Madisonville there are two curves so sharp that freight cars with standard couplers cannot make the turn, shackle bars being required. The right of way is from 20 to 60 feet wide, and at no place on complainant's line are there track scales. It has 9 box cars, 2 flat cars, 4 gondolas, and 1 stock car, and is therefore not in a position to exchange any equipment with the defendants or to furnish any equipment for joint use.

We think that much of this criticism as to the physical condition of the line of the complainant is the reflection of a special view in which the requirements of steam lines with respect to their roadbed and bridges were taken as a basis of comparison. Giving due weight to the testimony of witnesses on each side of the controversy,
27 but basing our conclusions more largely upon our own investigations, we think the complainant will have no difficulty in moving regular line equipment over its road. We do not understand that it is equipped for operating long freight trains. But whatever may be the facts with respect to all the details of that nature referred to in the record, we assume that the self-interest of the complainant will be sufficient to lead it to make the necessary arrangements so to conduct its operations as to be able to move traffic over its line with safety. This we think it can do, and this we doubt not it will do. We attach no importance therefore to the suggestion that the cars of the defendants will not be safe on the line of the complainant, or to the suggestion that if an order is entered requiring the defendants to join in through routes and through rates with the complainant an undue burden will be placed upon them under the so-called Carmack amendment to the act, because of the condition of the complainant's roadbed and bridges.

In conclusion we find that the complainant is entitled to a switch connection with the line of the defendant, the Baltimore & Ohio Southwestern Railroad Company, at Madeira, and to a switch connection at or near Hillsboro with the line of that defendant as well

as with the line of the Norfolk & Western Railway Company. We shall not here specify the exact points at which the connections are to be made. In case, however, the parties cannot promptly reach an agreement on that matter an order will be entered. We also find on the special facts of the case, as heretofore explained, that the record justifies an order requiring the defendants to join with the complainant in establishing through routes so that shippers on the line of the complainant at points between and including Boston on the west and Dodsonville on the east may have access to and from interstate points under through billing and through charges. The suggestion made on the brief of the complainant is that the joint rates, when established, ought not to be greater than the "maximum consisting of the present tariffs to Hillsboro and Madeira, respec-
28 tively, and the carload rates upon the complainant's line." Certainly this demand, as we understand it, is within reason from every point of view. We agree, however, with the defendants in saying that the case does not seem to justify putting them at the expense of reprinting their tariffs and getting the concurrence of their connections in new joint through rates to and from local points on the complainant's line. This may be avoided if the complainant will file its local rates with this Commission. This will make them applicable under our rules on through interstate movements.

As the complaint seems to have been abandoned by the petitioner so far as the Cincinnati, Lebanon & Northern Railway Company is concerned, we have not considered that line in reaching the conclusions herein expressed.

On the assumption that the parties will have no difficulty in carrying these findings into effect by agreement among themselves we shall enter no order at this time. Upon being advised of their failure to agree the necessary order will be entered.

29 *Notice to the Attorney General.*

Issued January 22, 1912.

In the United States Commerce Court.

THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY, AND THE NORFOLK & WESTERN RAILWAY COMPANY, PETITIONERS,
vs.
THE UNITED STATES OF AMERICA, AND THE CINCINNATI & COLUMBUS TRACTION COMPANY, RESPONDENTS. } No. 60.

THE PRESIDENT OF THE UNITED STATES:

TO HONORABLE GEORGE W. WICKERSHAM AS ATTORNEY GENERAL OF THE UNITED STATES:

You are hereby notified that a petition has been filed in the above entitled case in the office of the Clerk of the United States Commerce

Court at Washington, D. C., copy of which is herewith served by filing said copy in the Department of Justice.

In case no answer shall be filed to said petition within thirty days after such service, the petitioner may apply to the Court on notice for such relief as may be proper upon the facts alleged in said petition.

Witness the Honorable Martin A. Knapp, Presiding Judge of the United States Commerce Court, this 22d day of January, A. D. 1912.

[SEAL.] G. F. SNYDER, *Clerk.*

Original of above notice and copy of petition served upon Honorable George W. Wickersham, Attorney General of the United States, this 22nd day of January, A. D. 1912. (Accepted for Blackburn Esterline by Mrs. B. M. Power.)

F. J. STAREK,
Marshal.
By JAMES L. MURPHY,
Deputy Marshal.

30 *Notice to the Chairman of the Interstate Commerce Commission.*

Issued January 22, 1912.

In the United States Commerce Court.

THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY, AND THE NORFOLK & WESTERN RAILWAY COMPANY, PETITIONERS, *vs.* THE UNITED STATES OF AMERICA, AND THE CINCINNATI & COLUMBUS TRACTION COMPANY, RESPONDENTS.	No. 60.

THE PRESIDENT OF THE UNITED STATES:

TO HON. CHARLES A. PROUTY AS CHAIRMAN OF THE INTERSTATE COMMERCE COMMISSION:

You are hereby notified that a petition has been filed in the above entitled case in the office of the Clerk of the United States Commerce Court at Washington, D. C., copy of which is herewith served by filing said copy in the office of the Secretary of the Interstate Commerce Commission.

In case no answer shall be filed to said petition within thirty days after such service, the petitioner may apply to the Court on notice for such relief as may be proper upon the facts alleged in said petition.

Witness the Honorable Martin A. Knapp, Presiding Judge of the United States Commerce Court, this 22d day of January, A. D. 1912.
[SEAL.] G. F. SNYDER, *Clerk*.

Original of above notice and copy of petition served upon Chas. A. Prouty, Chairman of the Interstate Commerce Commission, this 22nd day of January, A. D. 1912. (Accepted by C. H. Farrell.)

F. J. STAREK,
Marshal.
By JAMES L. MURPHY,
Deputy Marshal.

31 *Summons to the Cincinnati & Columbus Traction Company.*

Issued January 22, 1912.

In the United States Commerce Court.

THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY, AND THE NORFOLK & WESTERN RAILWAY COMPANY, PETITIONERS,
vs.
THE UNITED STATES OF AMERICA, AND THE CINCINNATI & COLUMBUS TRACTION COMPANY, RESPONDENTS.
No. 60.

THE PRESIDENT OF THE UNITED STATES:

TO THE CINCINNATI & COLUMBUS TRACTION COMPANY, RESPONDENT:

You are hereby summoned and required within thirty days after service hereof to appear and answer unto a petition filed in the above entitled case in the office of the Clerk of the United States Commerce Court at Washington, D. C., copy of which is herewith served upon you.

In case no answer shall be filed within the time named, the petitioner may apply to the Court on notice for such relief as may be proper upon the facts alleged in said petition.

Witness the Honorable Martin A. Knapp, Presiding Judge of the United States Commerce Court, this 22d day of January, A. D. 1912.
[SEAL.] G. F. SNYDER, *Clerk*.

Summons and copy of petition served upon The Cincinnati & Columbus Traction Company by posting same in the office of the Secretary of the Interstate Commerce Commission; copies of papers also sent to company at Norwood, Ohio, this 22d day of January, A. D. 1912.

F. J. STAREK,
Marshal.
By JAMES L. MURPHY,
Deputy Marshal.

32 *Appearance of Interstate Commerce Commission.*

Filed January 25, 1912.

In the United States Commerce Court.

THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY, AND THE NORFOLK & WESTERN RAILWAY COMPANY, PETITIONERS, *v.* THE UNITED STATES OF AMERICA, AND THE CINCINNATI & COLUMBUS TRACTION COMPANY, RESPONDENTS.	No. 60.

To Mr. G. F. SNYDER, *Clerk, U. S. Commerce Court:*

I hereby enter herein the appearance of the Interstate Commerce Commission as a party respondent, and of myself as its solicitor.

CHAS. W. NEEDHAM,
Solicitor, Interstate Commerce Commission.

JANUARY 24, 1912.

33 *Appearance of Cincinnati & Columbus Traction Company.*

Filed January 31, 1912.

In the United States Commerce Court.

THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY AND THE NORFOLK & WESTERN RAILWAY COMPANY *vs.* THE UNITED STATES OF AMERICA AND THE CINCINNATI & COLUMBUS TRACTION COMPANY.	No. 60. Entry of appearance of the Cincinnati & Columbus Traction Company.

The appearance of the Cincinnati and Columbus Traction Company party defendant, in the above entitled action, is hereby entered.

Dated at Cincinnati, Ohio, this 29th day of January, 1912.

THE CINCINNATI & COLUMBUS TRACTION COMPANY,
By C. B. MATTHEWS, *Its Atty.*

34 *Notice of motion for preliminary injunction, and acceptance of service thereof.*

Filed February 2, 1912.

In the United States Commerce Court.

BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY ET AL. *vs.* UNITED STATES OF AMERICA ET AL.	In Equity No. 60.

To THE UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION, AND THE CINCINNATI & COLUMBUS TRACTION COMPANY:

Please take notice that at the opening of the session of the Commerce Court of the United States, at its court room, in the City of

Washington, on February 6, 1912, the undersigned will present a motion in the above entitled case for an interlocutory or preliminary injunction.

BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY,
NORFOLK & WESTERN RAILWAY COMPANY,
By EDWARD BARTON (by RWM),
THEODORE W. REATH "
R. WALTON MOORE,
Counsel.

Service of the foregoing notice is hereby accepted this the 25th day of January, 1912.

CHAS. W. NEEDHAM,
Sol. Interstate Commerce Commission.
BLACKBURN ESTERLINE,
For the United States.

Service of the foregoing notice is hereby accepted this the 29th day of January, 1912.

THE CIN. & COLUMBUS TRACTION CO.,
By C. B. MATTHEWS, *Its Atty.*

35 *Motion of United States to dismiss.*

Filed February 6, 1912.

In the United States Commerce Court.

THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY AND THE NORFOLK & WESTERN RAILWAY COMPANY, PETITIONERS, *v.* THE UNITED STATES OF AMERICA, AND THE CINCINNATI & COLUMBUS TRACTION COMPANY, RESPONDENTS.	No. 60.

MOTION OF THE UNITED STATES TO DISMISS THE PETITION.

The Attorney General of the United States, on behalf of the United States, moves the court to dismiss the petition on the ground that it does not set forth a cause of action, for the following reasons:

1. The claim that the commission had before it no valid demand for the establishment of the switch connection, is not sound in law.

2. The claim that even if the commission had before it no demand, it was still without power to make the order, is unsound in law.

3. The claim that the commission had no authority to require a switch connection with this electric railroad, is not sound in law.

36 4. The claim that the commission erred because the building of the required switch line would necessitate condemnation of some land by the petitioner, is not sound in law.

5. The claim that the order of the commission was unlawful in requiring interchange of equipment is not sound in law.

6. The claim that the commission's findings of fact on the question of whether the connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same should or can be set aside is unsound in law.

7. The claim that the commission had no power to supplement the testimony of witnesses by independent investigation of its own in reaching its conclusions of fact is unsound in law.

8. The claim that the commission's finding and conclusion in respect to the alleged threatened insolvency of the traction company can be set aside is unsound in law.

9. The claim that, irrespective of this finding, the fact would require the refusal of the switch connection is not sound in law.

10. The claim that the conclusions of policy and findings of fact of the commission can be set aside on any of the grounds alleged in the petition is unsound in law.

37 Wherefore and for other reasons appearing on the face of the petition, and because there is no equity in it, this respondent prays that its motion be sustained and that the said petition be dismissed at petitioner's cost, and that the respondent be not required to make any answer thereto; and for such other and further action as may be appropriate.

GEORGE W. WICKERSHAM,
Attorney General.

38 *Journal entry.*

Proceedings of February 7, 1912.

THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY ET AL., PETITIONERS,
vs.
THE UNITED STATES OF AMERICA AND THE CINCINNATI & COLUMBUS TRACTION COMPANY, RESPONDENTS,
INTERSTATE COMMERCE COMMISSION, INTERVENER. } No. 60.

Said cause came on for further hearing upon the motion for preliminary injunction and the arguments of counsel were concluded, Mr. Charles W. Needham appearing on behalf of the Interstate Commerce Commission, Mr. Assistant Attorney General Denison on behalf of the United States, Mr. C. Bentley Matthews on behalf of the Cincinnati & Columbus Traction Company, and Mr. R. Walton Moore on behalf of the petitioners. Mr. Denison was granted until to morrow to file a brief. Thereupon said cause was taken under advisement by the Court.

39 *Journal entry.*

Proceedings of February 10, 1912.

THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY ET AL., PETITIONERS,
vs.
THE UNITED STATES OF AMERICA AND THE CINCINNATI & COLUMBUS TRACTION COMPANY, RESPONDENTS,
INTERSTATE COMMERCE COMMISSION, INTERVENER. } No. 60.

In said cause the Court directed that an order be entered granting a preliminary injunction and denying the motion to dismiss. The Court stated that inasmuch as the grounds upon which this injunction is granted go to the merits of the case and virtually dispose of it, as now appears, an opinion will be filed as soon as it can be prepared in which the views of the Court will be more fully expressed.

40 *Order denying motion to dismiss and granting preliminary injunction.*

Entered February 14, 1912.

In the United States Commerce Court.

February Term, 1912.

THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY AND THE NORFOLK & WESTERN RAILWAY COMPANY, PETITIONERS,
vs.
THE UNITED STATES OF AMERICA AND THE CINCINNATI & COLUMBUS TRACTION COMPANY, RESPONDENTS,
THE INTERSTATE COMMERCE COMMISSION, INTERVENER. } In Equity No. 60.

ORDER.

This cause came on to be heard at this term and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows, viz:

That the motion of the United States to dismiss the petition be denied;

That a preliminary injunction issue as prayed in the petition, and that the order of the Interstate Commerce Commission, made on the 13th day of December, 1911, on complaint of the Cincinnati &

Columbus Traction Company *vs.* the Baltimore & Ohio Southwestern Railroad Company et al. the said order being as set forth in the petition herein, be suspended and enjoined until the further order of the Court.

By the Court:

MARTIN A. KNAPP,
Presiding Judge.

FEBRUARY 14, 1912.

41 *Order granting Cincinnati & Columbus Traction Company leave to withdraw answer, etc.*

Entered February 16, 1912.

In the United States Commerce Court.

THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY AND THE NORFOLK & WESTERN RAILWAY COMPANY
vs.
THE UNITED STATES OF AMERICA AND THE CINCINNATI & COLUMBUS TRACTION COMPANY. } No. 60.

Upon application of The Cincinnati and Columbus Traction Company, one of the respondents herein, leave is hereby given to it to withdraw its answer, and to elect to stand upon the motion to dismiss the petition, and said answer is accordingly withdrawn and said election hereby entered of record.

MARTIN A. KNAPP,
Presiding Judge.

FEBRUARY 16, 1912.

42 *Motion of Interstate Commerce Commission for leave to withdraw answer, etc.*

Filed February 17, 1912.

In the United States Commerce Court.

February session, 1912.

THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY AND THE NORFOLK & WESTERN RAILWAY COMPANY, PETITIONERS,
v.
UNITED STATES OF AMERICA AND THE CINCINNATI & COLUMBUS TRACTION COMPANY, RESPONDENTS, AND INTERSTATE COMMERCE COMMISSION, INTERVENING RESPONDENT. } No. 60.

Comes now the Interstate Commerce Commission, intervening respondent, and asks leave to withdraw its answer heretofore filed

herein and to join in and adopt the motion of the United States to dismiss the petition in said cause.

CHAS. W. NEEDHAM,
Solicitor for the Interstate Commerce Commission.

43 *Order granting Interstate Commerce Commission leave to withdraw answer, etc.*

Entered February 17, 1912.

In the United States Commerce Court.

February session, 1912.

THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY AND THE NORFOLK & WESTERN RAILWAY COMPANY, PETITIONERS,
v.
UNITED STATES OF AMERICA AND THE CINCINNATI & COLUMBUS TRACTION COMPANY, RESPONDENTS, AND INTERSTATE COMMERCE COMMISSION, INTERVENING RESPONDENT. } No. 60.

On motion duly made and filed in that behalf, it is ordered that leave be and the same is hereby given the Interstate Commerce Commission, intervening respondent in the above entitled cause, to withdraw its answer heretofore filed herein and to join in and adopt the motion of the United States to dismiss the petition.

By the court:

MARTIN A. KNAPP,
Presiding Judge.

44 *Election of United States and Interstate Commerce Commission to stand upon motion to dismiss.*

Filed February 17, 1912.

In the United States Commerce Court.

February session, 1912.

THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY AND THE NORFOLK & WESTERN RAILWAY COMPANY, PETITIONERS,
v.
UNITED STATES OF AMERICA AND THE CINCINNATI & COLUMBUS TRACTION COMPANY, RESPONDENTS, AND INTERSTATE COMMERCE COMMISSION, INTERVENING RESPONDENT. } No. 60.

Come now the United States of America, respondent, and the Interstate Commerce Commission, intervening respondent, by their re-

spective counsel, and inform the court that they elect to stand upon the motion to dismiss.

WINFRED T. DENISON,
Assistant Attorney General.
CHAS. W. NEEDHAM,
Solicitor for the Interstate Commerce Commission.

45 *Opinion.*

Filed April 9, 1912.

United States Commerce Court.

No. 60.—February session, 1912.

BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY AND NORFOLK & WESTERN RAILWAY COMPANY, PETITIONERS,
v.
UNITED STATES OF AMERICA AND CINCINNATI & COLUMBUS TRACTION COMPANY, RESPONDENTS.
INTERSTATE COMMERCE COMMISSION, INTERVENER.

ON MOTION FOR PRELIMINARY INJUNCTION.

For opinion of the Interstate Commerce Commission, see 20 I. C. C. Rep., 486.

Mr. Edward Barton, *Mr. Theodore W. Reath*, and *Mr. R. Walton Moore*, with whom *Mr. Joseph I. Doran* was on the brief, for the petitioners.

Mr. Winfred T. Denison, Assistant Attorney General, and *Mr. Blackburn Esterline*, special assistant to the Attorney General, for the United States.

Mr. C. Bentley Matthews for the Cincinnati & Columbus Traction Company.

Mr. Charles W. Needham for the Interstate Commerce Commission.

46 Before KNAPP, Presiding Judge, and ARCHBALD HUNT, CARLAND, and MACK, Judges.

[April 9, 1912.]

ARCHBALD, *Judge:*

This is a bill to set aside an order of the Interstate Commerce Commission. The proceedings before the Commission were instituted by the Cincinnati & Columbus Traction Company, an electric suburban railway, incorporated under the laws of Ohio, against the Baltimore & Ohio Southwestern Railroad and the Norfolk & Western

Railway, two separate trunk lines running east and west across the State of Ohio. The proceedings were taken under the first section of the interstate-commerce act to compel a switch connection at separate points with each of the railroads mentioned, and also to secure through routes and joint rates under the fifteenth section. There was a prayer in the latter connection that the railroads be required to exchange cars and equipment. The Commission in a joint order against both roads substantially granted the relief prayed for.

The provisions of the act with regard to the compelling of switch connections are as follows:

"Any common carrier subject to the provisions of this act, upon application of any lateral, branch line of railroad, or of any shipper tendering interstate traffic for transportation, shall construct, maintain, and operate upon reasonable terms a switch connection with any such lateral, branch line of railroad, or private side track
47 which may be constructed to connect with its railroad, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper. If any common carrier shall fail to install and operate any such switch or connection as aforesaid, on application therefor in writing by any shipper *or owner of such lateral, branch line of railroad*, such shipper *or owner of such lateral, branch line of railroad* may make complaint to the Commission, as provided in section thirteen of this act, and the Commission shall hear and investigate the same and shall determine as to the safety and practicability thereof and justification and reasonable compensation therefor, and the Commission may make an order, as provided in section fifteen of this act, directing the common carrier to comply with the provisions of this section in accordance with such order, and such order shall be enforced as hereinafter provided for the enforcement of all other orders by the Commission, other than the orders for the payment of money."

The words in italics were not in the act at the time the application for the switches in question was made to the railroads, nor at the time of the complaint to the Commission, which followed, but were introduced over a year afterwards, in June, 1910, by way of amendment. At the time the proceedings were instituted, therefore, the traction company had no right to file the complaint, and the
48 Commission, in consequence, except for the change in the law, would have been without authority to entertain it. *Interstate Commerce Commission* v. *D. L. & W. R. R.*, 216 U. S., 531. After the testimony had been taken, however, and before any order had been entered, in March, 1910, immediately following the decision just cited, the case was reopened at the instance of the traction company to permit two shippers along the line of the road, one at Marathon and the other at Hillsboro, to be added as complainants. This was

objected to by the railroads on the ground that it could not overcome the want of jurisdiction when the case originated, and could not in any respect supply the necessary preliminary application in writing, which is required by the statute as the basis of the subsequent proceedings. The Commission overruled the objection, and, having considered the case on the merits, made the following order:

"This case coming on to be further considered, and it appearing that the parties in interest have failed to put in effect the findings made by this Commission in its report herein, dated March 14, 1911, and that the above-named complainant petitions by counsel for an order of relief in the premises:

"It is ordered that defendant The Baltimore & Ohio Southwestern Railroad Company be, and it is hereby, notified and required to construct, on or before the 15th day of February, 1912, and thereafter to maintain and operate during a period of not less than two years, a switch connection for the transfer of interstate traffic to and
49 from the line of the above-named complainant company at Madeira, Ohio, the expense of installing such connection to be borne by said complainant.

"It is further ordered that said defendant The Baltimore & Ohio Southwestern Railroad Company, be, and it is hereby, notified and required to construct, on or before the 15th day of February, 1912, and thereafter to maintain and operate during a period of not less than two years, a switch connection for the transfer of interstate traffic to and from the line of the above-named complainant company at or near Hillsboro, Ohio, the expense of installing such connection to be borne by said complainant.

"It is further ordered that defendant Norfolk & Western Railway Company be, and it is hereby, notified and required to construct, on or before the 15th day of February, 1912, and thereafter to maintain and operate during a period of not less than two years, a switch connection for the transfer of interstate traffic to and from the lines of the above-named complainant company at or near Hillsboro, Ohio, the expense of installing such connection to be borne by said complainant.

"And it is further ordered that defendants The Baltimore & Ohio Southwestern Railroad Company and Norfolk & Western Railway Company, according as their various lines may run, be, and they are hereby, notified and required to establish and put in force, on or before the 15th day of February, 1912, and for a period of at least two years thereafter to maintain, through routes to and from
50 interstate points to and from all points on the complainant's line between and including Boston and Dodsonville, in the State of Ohio, in order that shippers at and between those points may have access to and from interstate points by interchange of cars under through billing and through charges based upon the rates of the respective carriers herein to and from the junction points established by this order, the complainant carrier having filed its local

rates with this Commission as applicable to interstate movements over such through routes."

Several objections are made to this order. In the first place, renewing the one made before the Commission, it is contended that the introduction, while the case was pending before the Commission, of entirely new and different complainants, who had made no previous application for the switches, was beyond the power of the Commission to allow, and vitiates the proceedings. An initial application in writing from the party entitled to make it at the time is essential, as it is said, in order to comply with the statute, and can not be dispensed with nor afterwards supplied, and, with all that has been done, is still lacking. Nor is this met, as it is urged, by the suggestion that the Commission is an administrative body not hampered by rules, and thus competent to reform the proceedings in the way which was done to meet the exigency.

It was also further objected that the Commission failed to determine the compensation to be severally made to the railroads for the switch connection with each which was ordered, having simply
51 directed that the expense of installation should be borne by the traction company, without more, although the statute requires that, along with the question of the safety, practicability, and justification for the switch connection, the Commission shall determine the reasonable compensation for it.

And it is finally objected that, in excess of its powers or even of Congress itself to require (*Central Stock Yards Co.* v. *Louisville & Nashville R. R.*, 192 U. S., 568; *Same* v. *Same*, 212 U. S., 132), the Commission ordered an interchange of cars along with through billing.

These are serious objections which would have to be carefully considered except for the conclusion which we have reached on the underlying question, viz, whether the traction company's road is a "lateral, branch line of railroad" within the meaning of the statute, which, if found against that company, is conclusive.

The Cincinnati & Columbus Traction Company was organized and is operated under the laws of Ohio as an electric interurban railway and is classified by those laws with street railways, by the provisions for which, and not those for steam railroads, it is controlled and regulated. It was chartered to construct a line of this character from Cincinnati to Columbus, something over a hundred miles, which has actually been built from Norwood, a suburb of Cincinnati, to Hillsboro, about half the distance. It is a common carrier of persons and property, and is also engaged in the transportation of express matter.

52 The Baltimore & Ohio Southwestern Railroad is a consolidated corporation organized under the laws of Ohio and Indiana, and operating an eastern and western trunk line, through and across those States, into and through the State of Illinois, and also into the State of Kentucky. It reaches Hillsboro by a branch line which connects with its main line, running to Cincinnati.

The Norfolk & Western Railway is organized under the laws of Virginia and operates a line of railway extending through parts of Ohio, West Virginia, Kentucky, Maryland, North Carolina, and Tennessee. It also has a branch line to Hillsboro, which connects with its main line to Cincinnati.

In relative position to the line of the Cincinnati & Columbus Traction Company the Baltimore & Ohio Southwestern is to the north and the Norfolk & Western to the south of it, the traction company's railroad being intermediate between the two and substantially dividing the diamond-like section of territory lying in between them. At Norwood the station of the traction company immediately adjoins that of the Baltimore & Ohio Southwestern, and for about six miles east from there its line not only parallels but is contiguous to the right of way of that railroad, while a few miles further on, at Perinton, it practically adjoins the right of way of the Norfolk & Western, which it similarly parallels for about four miles to Stonelick; and at the other or eastern end, for a distance of some four or five miles, at Hillsboro, it again parallels the tracks of the Baltimore &
53 Ohio Southwestern, the rights of way of the two roads being immediately adjacent.

As found by the Commission in its report, the communities common to the traction company and the railroads at the eastern end of the line in the vicinity of Hillsboro are reasonably well served by those roads with respect to interstate shipments; and the same is true also of the places at the other end, from Stonelick westward, some of which are within a stone's throw of either the Norfolk & Western or the Baltimore & Ohio Southwestern. But at Boston, to the east of there, a town of some five hundred inhabitants, the distance is about five miles by the country roads to Batavia and something less than that to Baldwin, both of them stations on the line of the Norfolk & Western, and not less than eight miles to the nearest station on the Baltimore & Ohio Southwestern, while Dodsonville, a town of one hundred and fifty people, still further east towards Hillsboro, is also some four or five miles away from any station on the Baltimore & Ohio Southwestern and as much as eight miles from the nearest station on the Norfolk & Western. And between Boston on the west and Dodsonville on the east, a distance of about twenty miles, there are several villages, the largest of which is Fayetteville, with seven hundred inhabitants, which are from five to twelve miles distant from one or the other of the steam roads in question.

Conceiving that the first set of places described were sufficiently served in interstate commerce by the Norfolk & Western Rail-
54 way or the Baltimore & Ohio Southwestern Railroad, the Commission declined, so far as they were concerned, to make any order establishing through routes or joint rates between the steam roads and the traction company. But, on the other hand, this not being the case between Boston and Dodsonville, by reason of the distance from the steam roads, approximating not less than five miles

in each instance, through routes and joint rates were established, and a switch connection given to make this effective. This connection was directed to be made, as to the Baltimore & Ohio Southwestern Railroad, at or near Hillsboro on the eastern end, and at Madeira, a few miles out of Norwood, on the western; and as to the Norfolk & Western at Hillsboro only, nothing being said as to any connection with it to the westward. The exact points where the connections should be made were not indicated, but the feasibility of connecting in each instance is asserted, in view of the fact that when the traction road was in process of construction, ten or more years ago, there was such a physical connection with the one road at Madeira on the western end and with both roads on the eastern end at a point spoken of as Hillsboro Junction. It is intimated that if the parties can not agree as to the specific place for making the connection in each case, a more definite order will be entered.

In considering whether upon this showing the Cincinnati & Columbus Traction Company is a lateral branch railroad, within the meaning of the law, it is to be observed that, according to the test ap-
55 plied by the Commission, it is held to be such as to places and shippers along its line in the intermediate territory between Dodsonville and Boston, remote from and not sufficiently served by the trunk lines, but not as to those east or west of there, as the road approaches its termini, where this is not the case. But it is obvious that this is not and can not be the correct criterion. A road is or is not a lateral branch railroad, according to the relation which it bears to the line with which a switch connection is asked. And this relation is one of road to road, and not of shippers or territory. A road, in other words, does not have the character of a branch or lateral road as to some shippers and territory and not have it as to others. There is no such dividing up or limiting it, nor can it be of that shifting kind. Looking to the purpose of the law, a road is a lateral branch road when it is tributary to and dependent on another for an outlet; that is to say, where it is essentially a feeder, contributing traffic and capable of interchanging it therewith. It is not such where it is in effect an independent and competing line. Nor is this any less the case because it may not compete as to a portion of the territory involved. It is the general effect which decides, and that is not in doubt here. All three roads in the present instance have the same general east and west direction, and, so far as concerns Hillsboro on the east and Cincinnati or Norwood on the west, run between the same points. For half this distance also one or other of the steam roads draws its local traffic from and serves substantially
56 the same territory as the traction company. And so clearly are they, within the limits named, competing lines, that admittedly any attempt to consolidate the traction company with either of them would offend against the State if not the Federal law. Neither is it every carrier that is entitled to a switch connection with every other. As is said in the *Rahway Valley Railroad case* (216

U. S., 531), "The object was not to give a roving commission to every road that might see fit to make a descent upon a main line." It is the dependent or tributary character which gives rise to the right, and that is not determined by mere proximity or terminal approach, or the fact that the road seeking a connection has come to the end of its line. The contrast in the statute is with a private side track constructed to connect with an interstate carrier, with which a lateral branch road is thus associated and presumably intended to be compared. The point here is that the traction company's road, instead of being dependent or tributary, is in its own peculiar sphere, and, as to both the steam roads, an equal, independent, and competing line. Nor is this affected by the fact that as at present constructed it extends no further than Hillsboro or Norwood, and that upon the arrival at either of these places its carriage of persons or property is at an end. This is true even of a trunk line, when its terminus is reached, without thereby making out the necessary relation by which a switch connection with another road is able to be compelled. It may be that some shippers along the line of the traction com-
57 pany's road are not so fully accommodated as they might be, as the case stands; and their needs are to be consulted to a certain extent without doubt. But this is not controlling, and their rights have necessarily to be worked out through the road for which in each instance a switch connection is sought, the character of which as a lateral branch line is only incidentally affected thereby. Without undertaking therefore to further define a "lateral branch line of railroad," we are clearly of opinion that the road of this traction company does not come within any reasonable meaning of the language used in the statute to describe the class of roads entitled to a switch connection. And if we are right in this view, the Commission was without jurisdiction to make the order in question.

A preliminary injunction was therefore properly ordered and the motion to dismiss will be overruled.

58 *Journal entry.*

Proceedings of April 19, 1912.

BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY ET AL., PETITIONERS, *vs.* THE UNITED STATES OF AMERICA AND THE CINCINNATI & COLUMBUS TRACTION COMPANY, RESPONDENTS; INTERSTATE COMMERCE COMMISSION, INTERVENER.	No. 60.

This 19th day of April, 1912, this cause came on for further hearing, and thereupon the counsel for the petitioners, before moving for a final decree, offered in evidence a duly certified copy of the pleadings and evidence had and taken before the Interstate Commerce

Commission in the proceedings which resulted in the order attacked in this cause, and moved the Court to receive the same as evidence and make the same a part of the record herein, the same having been heretofore filed in the office of the clerk on February 7, 1912.

And thereupon the counsel for the respondents and each of them objected to receiving the same in evidence and making the same a part of the record in said cause for the following reasons, viz:

1. That in the state of the pleadings herein and upon the issue determined by this Court as set forth in its opinion, the said evidence is irrelevant and immaterial.

2. That the said evidence before the Interstate Commerce Commission is relevant and material only upon allegations as to whether the Commission had before it substantial evidence upon which to base the order, and that said issue was not considered or determined by the Court in its opinion.

59 3. That the Court in the hearing of said cause and in writing its opinion herein did not consider the said evidence or any part of the same.

And thereupon the Court overruled the said offer and declined to receive the said evidence before the said Interstate Commerce Commission, on the ground that it was irrelevant and immaterial upon the issue determined by the Court.

To which ruling of the Court an exception was duly prayed by the petitioners and each of them and allowed and made a part of the record.

Whereupon counsel for the petitioners moved for a final decree.

60 *Final decree.*

Entered April 19, 1912.

In the United States Commerce Court.

April Session, 1912.

BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY AND THE NORFOLK & WESTERN RAILWAY COMPANY, PETITIONERS, v. UNITED STATES OF AMERICA AND CINCINNATI & COLUMBUS TRACTION COMPANY, RESPONDENTS, INTERSTATE COMMERCE COMMISSION, INTERVENING RESPONDENT.	No. 60.

FINAL DECREE.

It appearing that the answers heretofore filed by the respondent, Cincinnati & Columbus Traction Company, and the intervening

respondent, the Interstate Commerce Commission, have been withdrawn, and that said parties have united in the motion to dismiss, filed herein by the United States, and that both of said respondents and said intervening respondent elect to stand on the said motion to dismiss and decline to make answer or otherwise further plead.

It is now by the Court adjudged, ordered and decreed, for the reasons stated in the opinion of this Court, which is hereby made a part of the record, that the said motion to dismiss be and the same is hereby overruled; that the preliminary injunction heretofore awarded herein be, and the same is, now made permanent and perpetual; that the said order of the Interstate Commerce Commission attacked in this case be, and the same is, now wholly set aside and annulled.

BY THE COURT:

MARTIN A. KNAPP,
Presiding Judge.

To the entry of which decree the said respondents and the said intervening respondent severally object and except.

61 *Petition for appeal.*

Filed April 23, 1912.

In the United States Commerce Court.

April Session, 1912.

BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY AND NORFOLK & WESTERN RAILWAY COMPANY, PETITIONERS,
v.
UNITED STATES OF AMERICA AND CINCINNATI & COLUMBUS TRACTION COMPANY, RESPONDENTS, INTERSTATE COMMERCE COMMISSION, INTERVENING RESPONDENT. } No. 60.

PETITION FOR APPEAL.

The United States of America and Cincinnati & Columbus Traction Company, a corporation, respondents, and Interstate Commerce Commission, intervening respondent, feeling themselves aggrieved by the final order or decree of the Commerce Court, entered April 19, 1912, by their respective counsel, pray an appeal to the Supreme Court of the United States from the said final order or decree.

The particulars wherein the United States and the other respondents consider the final order or decree erroneous are set forth in the assignment of errors on file, to which reference is made.

And the said United States and the other respondents pray that a transcript of the record, proceedings and papers on which the said

order or decree was made and entered, duly authenticated, may be transmitted forthwith to the Supreme Court of the United States.

GEORGE W. WICKERSHAM,
Attorney General of the United States.
C. BENTLEY MATTHEWS,
Solicitor for Cincinnati & Columbus Traction Company.
CHAS. W. NEEDHAM,
Solicitor for Interstate Commerce Commission.

Allowed:
MARTIN A. KNAPP,
Presiding Judge of the United States Commerce Court in said cause.

62 *Assignment of errors.*

Filed April 23, 1912.

In the United States Commerce Court.

April Session, 1912.

BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY AND NORFOLK & WESTERN RAILWAY COMPANY, PETITIONERS,
v.
UNITED STATES OF AMERICA AND CINCINNATI & COLUMBUS TRACTION COMPANY, RESPONDENTS, INTERSTATE COMMERCE COMMISSION, INTERVENING RESPONDENT. } No. 60.

ASSIGNMENT OF ERRORS.

Come now the United States of America and Cincinnati & Columbus Traction Company, a corporation, and Interstate Commerce Commission, by their respective counsel, and in connection with their petition for appeal, file the following assignment of errors on which they will rely upon said appeal to the Supreme Court of the United States from the final order or decree of the Commerce Court entered against them April 19, 1912, in the above entitled cause:

I.

The Commerce Court erred in granting the preliminary injunction enjoining the order of the Interstate Commerce Commission of December 13, 1911, which is fully set out in the petition, and in suspending the force and effect of the same.

II.

The Commerce Court erred in denying the motion of the United States to dismiss the petition, which said motion was joined in and adopted by the respondents Cincinnati & Columbus Traction Company and Interstate Commerce Commission, and in not sustaining the said motion.

63 III.

The Commerce Court erred in holding and adjudging that the line of railroad of respondent Cincinnati & Columbus Traction Company is not a lateral branch line of railroad within the meaning of the act of Congress entitled "An Act to Regulate Commerce", etc., approved February 4, 1887, as amended by an act entitled "An Act to Create a Commerce Court", approved June 18, 1910.

IV.

The Commerce Court erred in holding and adjudging that the Interstate Commerce Commission was and is without power to order and require the Baltimore & Ohio Southwestern Railroad Company to maintain and operate during a period of not less two years from February 15, 1912, a switch connection with the Cincinnati & Columbus Traction Company for the transfer of interstate traffic to and from the line of the said traction company, at or near Hillsboro, Ohio, the expense of installing such connection to be borne by the said traction company.

V.

The Commerce Court erred in holding and adjudging that the Interstate Commerce Commission was and is without power to order and require the Norfolk & Western Railway Company to maintain and operate during a period of not less than two years from February 15, 1912, a switch connection with the Cincinnati & Columbus Traction Company for the transfer of interstate traffic to and from the line
of the said traction company, at or near Hillsboro, Ohio, the
64 expense of installing such connection to be borne by the said traction company.

VI.

The Commerce Court erred in holding and adjudging that the Interstate Commerce Commission was without power to order and require the Baltimore & Ohio Southwestern Railroad Company and Norfolk & Western Railway Company, according as their various lines may run, to establish and put in force, and to maintain for a period of at least two years from February 15, 1912, through routes to and from interstate points to and from all points on the line of the Cin-

cinnati & Columbus Traction Company between and including Boston and Dodsonville, in the State of Ohio, in order that shippers at and between those points may have access to and from interstate points by interchange of traffic under through billing and through charges based upon the rates of the respective railroad companies to and from the junction points established by the order of the Interstate Commerce Commission.

VII.

The Commerce Court erred in holding and adjudging that the Interstate Commerce Commission was without power or authority to determine whether the line of railroad of said Cincinnati & Columbus Traction Company is a lateral branch line of railroad and was without power to establish through interstate routes from and to such points upon the said traction company's line as were not, and are not adequately served by the other two companies named.

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VIII.

The Commerce Court erred in setting aside and annulling the said order of the Interstate Commerce Commission, and in making permanent the preliminary injunction issued February 14, 1912, and in overruling the motion to dismiss the petition, for that (a) the petition does not set forth any cause of action and is insufficient to warrant the granting of the injunction or to form the basis for any relief from the order of the Interstate Commerce Commission; (b) nor have the said petitioners shown that there is any equity in their said petition upon which to grant any injunction or to form the basis for any relief from the said order; (c) nor have the petitioners shown that in making the said order the Interstate Commerce Commission acted beyond or without its jurisdiction or exceeded any power or authority conferred upon it by the Act to Regulate Commerce; (d) nor have the said petitioners shown that in making its said order the Interstate Commerce Commission violated any right of the said petitioners protected by the Constitution of the United States or any other right of the said petitioners over which this Court may exercise jurisdiction.

Wherefore, The United States and the other respondents pray that the said final order or decree of the Commerce Court, entered April 19, 1912, be reversed, annulled and set aside with directions that the petition be dismissed and for such other and further order as may be appropriate.

GEORGE W. WICKERSHAM,
Attorney General of the United States.
C. BENTLEY MATTHEWS,
Solicitor for Cincinnati & Columbus Traction Company.
CHAS. W. NEEDHAM,
Solicitor for Interstate Commerce Commission.

66 *Order allowing appeal.*

Entered April 23, 1912.

In the United States Commerce Court.

April Session, 1912.

BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY AND THE NORFOLK & WESTERN RAILWAY COMPANY, PETITIONERS,
v.
UNITED STATES OF AMERICA AND CINCINNATI & COLUMBUS TRACTION COMPANY, RESPONDENTS. INTERSTATE COMMERCE COMMISSION, INTERVENING RESPONDENT. } No. 60.

ORDER ALLOWING APPEAL.

In the above-entitled cause, the United States of America, and Cincinnati & Columbus Traction Company, respondents and Interstate Commerce Commission, Intervening Respondent, having made and filed their petition praying an appeal to the Supreme Court of the United States from the final order or decree of the Commerce Court entered April 19, 1912, and having also made and filed an assignment of errors, and having in all respects conformed to the statute and rules of court in such case made and provided—

It is ordered and decreed, That the said appeal be, and the same is hereby allowed as prayed and made returnable on the 23d day of May, A. D. 1912; and the Clerk is directed to transmit forthwith a properly authenticated transcript of the record, proceedings and papers on which said order or decree was made and entered to the Supreme Court of the United States.

MARTIN A. KNAPP,
Presiding Judge of the United States Commerce Court in said cause.

67 In the United States Commerce Court.

THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY AND THE NORFOLK & WESTERN RAILWAY COMPANY, PETITIONERS,
v.
UNITED STATES. } No. 60.

PRAECIPE FOR RECORD.

TO THE CLERK:

You will please prepare a transcript of the record in the above entitled cause to be filed in the Office of the Clerk of the Supreme

Court of the United States, upon the appeal in the above entitled cause, and include in the said transcript the following pleadings, proceedings, and papers on file or of record, to wit:

Petition for Injunction with exhibits;
Notice issued and filed in the Department of Justice;
Notice issued and filed with the Interstate Commerce Commission;
Notice issued to The Cincinnati & Columbus Traction Company;
Appearance of Interstate Commerce Commission;
Appearance of The Cincinnati & Columbus Traction Company;
Notice of Motion for Injunction;
Motion of the United States to Dismiss the Petition;
Journal Entry of Hearing, February 7, 1912;
Journal Entry of Action of the Court, February 10, 1912;
Order granting Preliminary Injunction, February 14, 1912;
Order Granting Leave to The Cincinnati & Columbus Traction Company to Withdraw Answer and to Elect to Stand upon the Motion to Dismiss;

68 Motion of Interstate Commerce Commission to Withdraw its Answer and to join in and adopt Motion to Dismiss;

Order entered Granting Leave to Interstate Commerce Commission to Withdraw its Answer and to Join in and Adopt the Motion to Dismiss;
Election of the United States and Interstate Commerce Commission to stand upon the Motion to Dismiss;
Opinion of the Commerce Court, April 9, 1912;
Journal Entry of Proceedings, April 19, 1912;
Final Decree;
Petition for Appeal;
Assignment of errors;
Order allowing Appeal.

BLACKBURN ESTERLINE
Special Assistant to the Attorney General.
C. BENTLEY MATTHEWS
Solicitor for The Cincinnati & Columbus Traction Company.
CHAS. W. NEEDHAM
Solicitor for Interstate Commerce Commission.

69 *Notice of filing of praecipe and acknowledgment of service thereof.*

Filed May 4, 1912.

In the United States Commerce Court.

THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY AND THE NORFOLK & WESTERN RAILWAY COMPANY, PETITIONERS,
v.
UNITED STATES OF AMERICA AND THE CINCINNATI & COLUMBUS TRACTION COMPANY, RESPONDENTS, AND INTERSTATE COMMERCE COMMISSION, INTERVENING RESPONDENT. } No. 60.

NOTICE.

To

EDWARD BARTON, Esq.,
Solicitor for The Baltimore & Ohio Southwestern Railroad Company, and
R. WALTON MOORE, Esq., and
THEODORE W. REATH, Esq.,
Solicitors for The Norfolk & Western Railway Company.

Please take notice that the Respondents and the Intervening Respondent have filed in the Office of the Clerk of the United States Commerce Court praecipe for record, of which the attached is a certified copy.

BLACKBURN ESTERLINE
Special Assistant to the Attorney General.

Service of a copy of the above notice, with a certified copy of praecipe for record is hereby admitted this 1st day of May, 1912.

EDWARD BARTON
Solicitor for the Baltimore & Ohio Southwestern Railroad Company.
JOSEPH I. DORAN, THEODORE W. REATH and R. WALTON MOORE
Solicitors for The Norfolk & Western Railway Company.

70 United States Commerce Court.

No. 60.

THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY AND THE NORFOLK & WESTERN RAILWAY COMPANY, PETITIONERS,

vs.

THE UNITED STATES OF AMERICA AND THE CINCINNATI & COLUMBUS TRACTION COMPANY, RESPONDENTS, INTERSTATE COMMERCE COMMISSION, INTERVENER.

UNITED STATES OF AMERICA, *ss:*

I, G. F. Snyder, Clerk of the United States Commerce Court, do hereby certify the above and foregoing (on pages numbered 1 to 69, inclusive) to be a true and complete transcript of the proceedings had and papers filed in the above entitled cause, made in accordance with the praecipe filed in the office of the Clerk of said Court on the first day of May, 1912, as the same appear from the original record in the Clerk's Office of said Court.

In testimony whereof I have hereunto set my hand and affixed the seal of the United States Commerce Court this 4th day of May, A. D., 1912.

[SEAL.] G. F. SNYDER, *Clerk.*

71 *Citation on appeal.*

UNITED STATES OF AMERICA, *ss:*

To BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY, AND THE NORFOLK & WESTERN RAILWAY COMPANY.

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to an appeal duly allowed and filed in the Clerk's Office of the United States Commerce Court, wherein the United States of America, Cincinnati & Columbus Traction Company, a corporation, and Interstate Commerce Commission, are appellants and you are appellees, to show cause, if any there be, why the final order or decree rendered against the said appellants as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Martin A. Knapp, Presiding Judge of the United States Commerce Court, this 23d day of April, A. D. 1912.

MARTIN A. KNAPP,
Presiding Judge of the United States Commerce Court.

Service of a copy of the within citation is hereby admitted this 29th day of April, A. D., 1912.

EDWARD BARTON,
Solicitor for Baltimore & Ohio Southwestern Railroad Company.

Service of a copy of the within citation is hereby admitted this 24th day of April, A. D., 1912.

THEODORE W. REATH,
R. WALTON MOORE,
Solicitors for The Norfolk & Western Railway Company.

(Indorsed:) File No. 23209. U. S. Commerce Court. Term No. 1133. The United States of America, Cincinnati & Columbus Traction Company, and Interstate Commerce Commission, appellants, vs. Baltimore & Ohio Southwestern Railroad Company and The Norfolk & Western Railway Company. Filed May 11th, 1912. File No. 23209.

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